



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WAGGONER GARR
ATTORNEY GENERAL**

October 31, 1963

Honorable G. F. Steger
County Attorney
Colorado County
Columbus, Texas

Opinion No. C-168

Re: Whether a contract for the sale of gravel and other road material by a County Clerk, in his individual capacity, to a contractor for use in the construction of a public highway, financed solely with state and federal funds, is invalid and related questions.

Dear Mr. Steger:

This office is in receipt of your request for an opinion on the following questions:

"1. Is a contract for the sale of gravel and other road material by a county clerk, in his individual capacity, to a contractor for use in the construction of a public highway, financed solely with state and federal funds, invalid?

"2. Would such sale amount to 'official misconduct' within the meaning of Article 5, Section 24 of the Constitution, and Articles 5970, 5973 and related articles of the Revised Civil Statutes?

"3. Would the sale of material by a land-owner, who happens to be a County Clerk, under such a contract amount to a violation of Article 373 of the Penal Code?"

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Article V, Section 24 of the Texas Constitution provides:

"County Judges, county attorneys, clerks of the District and County Courts, . . . , may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury."

Article 5970 of Vernon's Civil Statutes reads, in part, as follows:

"All district and county attorneys, county judges, commissioners, clerks of the district and county courts and single clerks in counties where one clerk discharges the duties of district and county clerk, county treasurer, sheriff, county surveyor, assessor, collector, constable, cattle and hide inspector, justice of the peace and all county officers now or hereafter existing by authority either of the Constitution or laws, may be removed from office by the judge of the district court for incompetency, official misconduct"

Article 5973 of Vernon's Civil Statutes reads as follows:

"By 'official misconduct,' as used herein with reference to county officers, is meant any unlawful behavior in relation to the duties of his office, wilful in its character, of any officer intrusted in any manner with the administration of justice, or the execution of the law; and includes any wilful or corrupt failure, refusal or neglect of an officer to perform any duty enjoined on him by law."

Article 373 of Vernon's Penal Code reads as follows:

"If any officer of any county, or of any city or town shall become in any manner pecuniarily interested in any contracts made by such county, city or town, through its agents, or otherwise, for the construction or repair of any bridge,

road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined not less than fifty nor more than five hundred dollars."

The sale of road material by a person does not in and of itself constitute a wrong. The above questions arise only for the reason that the person making the sale is a county official.

There is no constitutional or statutory prohibition which would render invalid a contract between a County Clerk, acting in his individual capacity, for the sale of material to either the State of Texas or the federal government.

The contract for sale of material in question is not a "contract made by such county, city or town, through its agents, or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county -", under the provisions of Article 373 of the Penal Code. Under the facts stated the contract under consideration is not one in which the county is involved or is not made by or on behalf of the county.

Under the facts submitted the sale of road building material by a County Clerk is not such an act as would be construed as "official misconduct" within the meaning of Article 5, Section 24 of the Constitution or Articles 5970 or 5973 of Vernon's Civil Statutes.

SUMMARY

A contract for the sale of gravel by a County Clerk, in his individual capacity, to a contractor for use in construction of a public highway, financed solely with state and federal funds is valid, and is not such a sale that would amount to

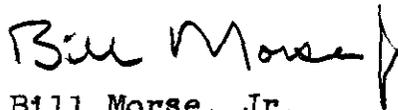
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"official misconduct" within the meaning of Article 5, Section 24 of the Constitution, or Articles 5970 and 5973 of Vernon's Civil Statutes, and is not a violation of Article 373 of the Penal Code.

Yours very truly,

WAGGONER CARR
Attorney General

By



Bill Morse, Jr.
Assistant

BMjr:sj

APPROVED:

OPINION COMMITTEE

W. V. Geppert, Chairman
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APPROVED FOR THE ATTORNEY GENERAL

By: Stanton Stone